Nos. 90-813, 90-974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HOUSTON LAWYERS' ASSOCIATION, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Petitioners,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS HOUSTON LAWYERS' ASSOCIATION, *ET AL.*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

ARGUMENT 1

Introduction and Summary of Argument 1

I. The State's Nonracial Reasons for the Use of At-Large Elections Cannot Outweigh a Clear Showing of Racial Vote Dilution. . . 3

A. A Vote Dilution Analysis that Requires Courts to Defer to the State's Interest in Maintaining At-Large Judicial Election Schemes Reintroduces the Intent Test Expressly Rejected by Congress in Amending §2 3

B. The State's Interest in Electing Judicial Candidates At-Large is Entitled to No Greater Deference than Its Interest in Electing Non-Judicial Candidates At-Large . . . 13

C. The State's Nondiscriminatory Reasons for Electing Judicial Candidates At-Large Cannot Cleanse the Proven Vote Dilution in this Case 19

D. The District Court Properly Weighed the State's Interests in this Case . 22

E. A §2 Remedy is Directed at Curing Dilution in the Electoral Process, Not Altering the Functions Performed by Judges 23

II. The State's Principal Argument Rests on a Fundamentally Erroneous Definition of a Single-Person Officer 28

III. Vote Dilution Can Be Measured in the Absence of the One-Person, One-Vote Requirement 31

IV. Congress Has Exercised its Enforcement Power Under the 14th and 15th Amendments to Outlaw Racial Vote Dilution in All Elections 34

CONCLUSION 40

TABLE OF AUTHORITIES

Cases: *Page:*

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 21

Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) 29, 30

Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988) 29

Georgia State Board of Elections v. Brooks, 111 S.Ct. 288 (1990) 27

Gingles v. Edmisten, 590 F.Supp. 345 (E.D.N.C. 1984), *aff'd*, 478 U.S. 30 (1986) 7

Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985) *aff'd* 477 U.S. 901 (1986) 29

Kendrick v. Walder, 527 F.2d. 44 (7th Cir. 1975) 9

Martin v. Haith, 477 U.S. 901 (1986) 27

McDaniel v. Sanchez, 452 U.S. 130 (1981) 24

McGhee v. Granville County, 860 F.2d 110 (4th Cir. 1988) 19

Moore v. Leflore County Board of Election Com'rs, 502 F.2d. 621 (5th Cir. 1974) 11

Morris v. Board of Estimate, 489 U.S. __, 103 L. Ed. 2d. 717 (1989) 30

Nevett v. Sides, 533 F.2d 1361 (5th Cir. 1976) 11

Oregon v. Mitchell, 400 U.S. 112 (1970) 35, 36

Page:

Perry v. City of Opelousas, 515 F.2d 639 (5th Cir. 1975) 11

Robinson v. Commisioners Court, Anderson County, 505 F.2d 674 (5th. Cir. 1974) 9

South Carolina v. Katzenbach, 383 U.S. 301 (1966) . . 35

Southern Christian Leadership Conference v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989.) 28

Thornburg v. Gingles, 478 U.S. 30 (1986) . . . . *passim*

Turner v. McKeithen, 490 F.2d 191 (5th Cir. 1973) . 11

Wallace v. House, 515 F.2d 619 (5th Cir. 1975) *vacated on other grounds*, 425 U.S. 947 (1976) 11, 16

Westwego Citizens for Better Government v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989) 20

White v. Weiser, 412 U.S. 783 (1973) 25

Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) 12

Constitutional Provisions and Statutes:

Rule 52, Fed. R. Civ. Proc. 21

United States Constitution, 14th Amendment . . 2, 34, 35

United States Constitution, 15th Amendment . . 2, 34, 35

Voting Rights Act of 1965, as amended, §2, 42 U.S.C. § 1973 . . . . . *passim*

Voting Rights Act of 1965, §14(c)(1), 42 U.S.C. § 1973*l*(c)(1) 38

Other Authorities: ***Page:***

Boyd & Markman, "The 1982 Amendments to the Voting Rights Act: A Legislative History," 40 Wash. and Lee L.Rev. 1347 (1983) 6

Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) 36

Hearings on S.53, S.1761, S.1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) 36

House Report No. 97-227, 97th Cong., 1st Sess. (1982) . . . . . *passim*

Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.-C.L.L.Rev. 173 (1989) 33

R. Engstrom, D. Taebel & R. Cole, "Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico," The Journal of Law & Politics, Vo. V., No. 3 (Spring 1989) 33

Senate Report No. 97-417, 97th Cong., 2nd Sess. (1982) . . . . . *passim*

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Introduction and Summary of Argument

The argument raised in the United States' brief advances a standard for assessing vote dilution claims under §2 that was expressly rejected by Congress. The rights of minority voters cannot be subordinated to the state's interest in

continuing to use electoral schemes that exclude minority voters from meaningful participation in the electoral process.

For the following three reasons, none of the Respondents' arguments advance supportable grounds upon which this Court can deny relief to the Petitioners. First, the so-called "single-person office" principle is inapplicable to the judicial offices challenged in this case. Second, the first prong of the tripartite vote dilution test set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986), does not preclude the application of §2 to the election of judges. Third, Congress exercised its enforcement powers under the 14th and 15th Amendments to cover state judicial elections under §2.

I. The State's Nonracial Reasons for the Use of At-Large Elections Cannot Outweigh a Clear Showing of Racial Vote Dilution.

A. A Vote Dilution Analysis that Requires Courts to Defer to the State's Interest in Maintaining At-Large Judicial Election Schemes Reintroduces the Intent Test Expressly Rejected by Congress in Amending §2

Although the United States agrees with the Petitioners that §2 covers the election of trial judges, it presents a new standard for assessing vote dilution claims involving the election of judges under the Act. The United States argues that a state's "strong, nondiscriminatory reasons for at-large judicial elections . . . can spell the difference between a lawful and unlawful electoral scheme."[1] U.S. *HLA* Brief at 17. In essence, the United States argues that legitimate state reasons for using a challenged election scheme may

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[1]Although the only question with regard to the state's interests properly before this Court is that raised by Judge Higginbotham and the Respondents -- namely, whether the state's interests may pretermit the application of §2 to the election of judges -- the United States' argument is sufficiently troubling to merit discussion here. Judge Higginbotham's argument was discussed in our opening brief. *See* HLA Petitioners' Brief at 24-49.

constitute an affirmative defense to proof of racial vote dilution.

This analysis radically departs from established standards for determining vote dilution under §2. No court ever has afforded controlling weight to the state's interests in a vote dilution case. Indeed, to afford such weight to the state's interests defeats the very design of §2's results test as contemplated by Congress and as interpreted by this Court, and re-imports into the vote dilution analysis the intent inquiry expressly rejected by Congress in amending the Act in 1982.

The United States argues that a state's interest in maintaining a challenged election scheme is entitled to "deference" except when "the plaintiffs can prove that the adoption or maintenance of an at-large system, whenever it occurred, was motivated by racial discrimination." U.S. *HLA* Brief at 23 n.14. The practical effect of this standard is to make all vote dilution claims turn on the plaintiff's ability to prove the illegitimacy of the state's interests.

Plaintiffs will prevail only when the state's asserted interests are, in fact, a pretext for intentional discrimination. Congress expressly rejected placing this burden upon plaintiffs.

The "totality of the circumstances" test was specifically designed to avoid an analysis of the rationale behind the use of a particular electoral structure -- even if that rationale was nondiscriminatory. Thus, Congress explicitly instructed that "the specific intent of this [§2] amendment is that the plaintiffs may choose to establish discriminatory results without proving *any* kind of discriminatory purpose." Senate Report No. 97-417, 97th Cong., 2nd Sess. (1982) at 28 (emphasis added)(hereinafter "S.Rep. at __").

Nor did Congress give states the right to assert nondiscriminatory purposes as an affirmative defense to a vote dilution claim. In fact, Congress specifically refused to endorse the test advanced by the United States, which would permit states to assert the legitimacy of their electoral schemes to rebut the plaintiff's proof of vote dilution. *See*

Additional Views of Senator Robert Dole,[2] S. Rep. at 195 (rejecting suggestion that "defendants be permitted to rebut a showing of discriminatory results by a showing of some *nondiscriminatory* purpose behind the challenged voting practice or structure")(emphasis added). Instead, Congress decided that whether a challenged electoral practice was adopted or maintained for legitimate reasons is of little or no probative value to a §2 results inquiry. S. Rep. at 27 (courts need make no determination "about the motivations which lay behind" the adoption or maintenance of a proposed electoral practice).

The United States, however, now advocates a radical departure from Congress' directive. It contends that "to the extent that there are legitimate and strong state interests in the at-large election of trial or appellate judges, that is

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[2]Senator Dole is recognized as the architect of §2(b) of the amended Act. *See* Boyd & Markman, "The 1982 Amendments to the Voting Rights Act: A Legislative History," 40 Wash. and Lee L.Rev. 1347, 1414-1415 (1983).

powerful evidence that minority electoral failure[3] is not the product of a 'built-in bias' against minorities but stems, instead, from other, neutral factors." U.S. HLA Brief at 23.

The United States' statement regarding "built-in bias" can be interpreted several ways, all of which are erroneous. To the extent that the United States uses "built-in bias" to re-import a motivational analysis into a §2 inquiry, the statement is at odds with the amended statute. Under amended §2's *results* test, it is immaterial whether plaintiffs can prove that there is "built-in bias" in the challenged electoral scheme. Thus, even if a state adduces evidence that its policy is "well-established historically, ha[s] legitimate functional purposes and was in its origins completely without racial implications," this evidence does not change a plaintiff's showing of vote dilution. *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984), *aff'd*, 478

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[3]Petitioners have proved more than just minority electoral failure. Based on the "totality of the circumstances" Petitioners proved, and the district court found, that African American voters in Harris County "do not have an equal opportunity to participate in the electoral process and elect candidates of their choice" in district judge elections. Pet. App. at 290a-291a.

U.S. 30 (1986). Quite to the contrary, persistent minority electoral failure as a result of a confluence of "neutral factors" is the *very essence* of a §2 claim.

If the United States' reference to "built-in bias" reflects its view that a state's strong, legitimate interest in a particular electoral practice may cleanse a finding of discrimination, the statement is plainly wrong. The strength of the state's interest in a particular election scheme tells the court nothing about whether the system effectively precludes minorities from meaningful electoral participation.

No language in the statute supports the view that a state's bona fide reasons for using a particular election structure cleanses that system of discriminatory results. Section 2(b)'s terms are specific. They delineate a clear standard for claims brought under the results test. That standard is further clarified by the Senate Report, in which Congress identifies the factors most relevant to a dilution inquiry. S. Rep. at 28-29. The test, as set out in the Senate Report, "provide[s] ample guidance to federal courts"

reviewing §2 claims. S. Rep. at 16. The United States may not ignore this guidance and engraft onto the "results" test its own, contrary standard for assessing claims under §2.

There is no case law supporting the United States' argument. No court ever has refused to find liability because the strength or legitimacy of the state's interests outweighed the plaintiff's claims. In fact, in the cases relied on by Congress in developing the results test, lower courts expressly refused to immunize dilutive election schemes from challenge simply because they "satisfy some legitimate governmental goals." *Robinson v. Commisioners Court, Anderson County*, 505 F.2d 674, 680 (5th. Cir. 1974). In the relevant case law, the fundamental meaning of "built-in bias" is that despite legitimate state interests, the system *operates* to discriminate against minorities. *See e.g., Kendrick v. Walder*, 527 F.2d. 44, 49 (7th Cir. 1975).

Most disturbing, however, is the United States' contention that a state's reasons for using a challenged electoral structure can *justify* or *excuse* that system's racially

discriminatory effect. *See* U.S. HLA Brief at 17 (referring to legitimate "justification" for electing judges under present system); U.S. HLA Brief at 28 (arguing that although some state interests may be "insufficient to justify a racially dilutive electoral process," other interests might meet that standard). The United States' admission that, in its view, racially dilutive electoral processes may be permissible if they serve strong state interests is critically revealing. It demonstrates the United States' willingness to subordinate the rights of the intended beneficiaries of the Voting Rights Act, *even when dilution is proven*, to the interests of the state.

In several of the 23 racial dilution cases that the United States mentions as having been relied on by Congress in amending §2, jurisdictions offered their legitimate, nonracial reasons for adopting and maintaining an at-large election structure. U.S. HLA Brief at 21-22. Nothwithstanding the legitimate reasons offered for the use of at-large elections in those cases, Congress decided that "even a consistently

applied practice premised on *a racially neutral policy* would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S.Rep. at 29 n.117. Instead, Congress instructed that "an aggregate of factors should be considered" in assessing vote dilution claims.[4] House Report No. 97-227, 97th Cong., 1st Sess. (1982) at 30 (hereinafter "House Rep. at __"). In enumerating these factors in both the Senate and House Reports, Congress never put forth the state's interest as an affirmative defense to the use of a discriminatory election scheme. *See e.g.*, House Rep. at 30; S. Rep. at 28-

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[4]This conclusion was consistent with the lower court cases reviewed by Congress. In those cases the district courts recognized that "[d]ilution, as with so many complex factual determinations turns on an aggregation of the circumstances." *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1973). *See also Nevett v. Sides*, 533 F.2d 1361 (5th Cir. 1976) (remanding for proper assessment of aggregate of factors); *Wallace v. House*, 515 F.2d 619, 623 (5th Cir. 1975) *vacated on other grounds*, 425 U.S. 947 (1976). Thus, although the state's interests were weighed, they were considered along with all of the other factors relevant to the existence of vote dilution, and were afforded no greater weight than other factors.

At the remedy stage, courts sought to accomodate the state's interests to the extent practicable in fashioning or approving a remedy to cure the proven dilution. *See e.g., Moore v. Leflore County Board of Election Com'rs*, 502 F.2d. 621 (5th Cir. 1974) (affirming the district court's rejection of a remedial plan that diluted African American voting strength *and* undermined legitimate state interests in equality of road mileage and land area); *Perry v. City of Opelousas*, 515 F.2d 639, 642 (5th Cir. 1975).

29. *See also* Brief of HLA Petitioners at 45-49.

To the contrary, when it amended §2, Congress modified the standards set out in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), for assessing vote dilution claims and explicitly eliminated, as a primary factor in a vote dilution analysis, the state's nondiscriminatory reasons for using a challenged electoral scheme. Congress decided instead that the state's rationale is relevant only as an optional factor in the *plaintiffs'* proof of discrimination.[5] *Compare Zimmer*, 485 F.2d at 1305, and S. Rep. at 28-29. Congress identified 7 other factors that were more probative

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[5]Congress identified the tenuousness of the state's policy underlying the use of the challenged electoral practice as an "additional factor that in some cases has had probative value *as part of the plaintiffs' evidence*" to establish vote dilution. S. Rep. at 29.

Under Congress' *results* test, the state's interests are irrelevant to proving the existence of vote dilution unless the plaintiffs attempt to prove "tenuousness" as part of their case in chief. When plaintiffs, as in this case, invite the inquiry, then tenousness is merely one factual question as part of the totality of the circumstances that may be found in favor of the plaintiffs or the defendants. The finding that a state electoral policy is not tenuous, however, is not an affirmative defense to proven vote dilution based on an aggregate of the other, more probative, factors identified by Congress.

Congress similarly decided that the "unresponsiveness" of elected officials is not a primary factor which need be proven by plaintiffs in a vote dilution case. *Compare Zimmer*, 485 F.2d at 1305 (listing unresponsiveness of elected officials prominently among factors to be considered) *and* S. Rep. at 29, *supra*.

of a §2 claim than articulated state interests. The United States simply ignores Congress' instructions and develops its own test for determining vote dilution under §2.

B. The State's Interest in Electing Judicial Candidates At-Large is Entitled to No Greater Deference than Its Interest in Electing Non-Judicial Candidates At-Large

The United States argues that because the "role of judges differs from those [sic] of legislative or executive officials" in that "judges are expected to be fair and impartial," the State's interest in using at-large elections may be "compelling," so as to defeat a claim of vote dilution. U.S. *HLA* Brief at 22 and 24. This argument is premised on the wholly insupportable and insulting premise that the election by minority voters of judicial candidates of their choice will destroy the impartiality judiciary.

According to the United States, an election scheme in which a white majority controls the election of judges is "accountable", while a system in which an African American

majority elects some judges is "partial."[6] Therefore, although the United States characterizes the current electoral system in Harris County, which prevents minority voters from meaningfully participating in the election of the county's 59 district judges, as one in which "all the people who may generally appear before a particular judge have a voice in the election" of that fair and impartial judge,[7] U.S.

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[6]Defendant-intervenor Wood is perhaps most candid and unabashed in articulating the concern that underlies the Respondents', Judge Higginbotham's and the United States' argument. In a revealing mischaracterization of the the petitioners' claims, Judge Wood asserts that the petitioners in Harris County seek to elect "black judges . . . accountable to black voters while other judges would be accountable to non-black voters." Brief of Respondent-Intervenor Sharolyn Wood at 43 (hereinafter "Wood Brief at __"). Judge Wood even declares that the African American voters in Harris County advocate "*a separate but equal* black judiciary serving the black community." *Id.* (emphasis added). What petitioners in fact seek as *voters*, not litigants, is participation in the selection of a county judiciary electorally accountable to all members of the electorate.

[7]The United States' position is ironic in that it, like that of the Respondents and Judge Higginbotham, fails to express similar concern, that minority voters and litigants under the present, purportedly "fair", system have virtually *no* opportunity to appear before judicial candidates of their choice. Judge Higginbotham, who attempts to calculate the likelihood of African American litigants in Harris County appearing before a judge elected from a "minority-dominated" subdistrict under a hypothetical 59 electoral sub-district plan, Pet. App. at 107a, never attempts to calculate the likelihood of African American litigants appearing before African American judges for whom they voted under the current system.

Of course, pointing out this irony does not address the legal flaw in the United States' argument: the right at stake is not the right of people who appear before a judge, but the right of African American voters to equal opportunity with white voters to participate in the election

HLA Brief at 23, it predicts that an alternative electoral system in which minority voters have a meaningful opportunity to participate in the election of some of the county's judges will result in a "partial" judiciary controlled by a "relatively discrete segment of the jurisdiction."[8] *Id.*

These erroneous assumptions taint the United States', the defendants' and Judge Higginbotham's analysis, and lead them all to the same conclusion -- that the election of judges must be protected from vote dilution claims by minority voters. The irrational assumption that African American judges would not uphold the judicial oath of impartiality because they were elected by voters of their same race, however, does not warrant the creation of special rules and exceptions for determining claims involving judicial elections

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of any government official.

[8]Under the United States' definition, African American voters are a "special interest group," U.S. HLA Brief at 25, while white voters are the neutral public.

under the Voting Rights Act.[9]

Moreover, the reasons offered by Texas for electing judges countywide are not unique to the election of judges. The state's rationale is, as the United States' concedes, "the reason usually given in support of at-large elections for municipal offices [namely] that at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties."[10] U.S. *HLA* Brief at 22, quoting *Wallace v. House*,

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[9]Respondents make this argument even though alternative remedies, alleged by the HLA Petitioners in their complaint in intervention, could alleviate the unlawful dilution proved without the use of sub-districts. *See* HLA Petitioners' Brief at 57-60.

Although HLA Petitioners take issue with the State Respondents' contention that even the use of limited or cumulative voting would require sub-districting in Harris County, Brief of Respondents at 29, that argument would be most appropriately addressed at the remedial stage of this litigation.

[10]There is no evidence in the record indicating that Texas adopted or maintained the current method of electing judges to serve the state's interest in a "fair and impartial judiciary." To the contrary, all of the evidence in the record points to the conclusion that Texas chose to elect its judges in the same manner that it elects candidates for other elected offices simply because that was its custom and not to serve any particular or "compelling" interest related to the function of judges.

Indeed, the testimony of Respondent-Intervenor Judge Harold Entz, undermines the notion that at-large elections are necessary to preserve impartiality of judges. TR. at 4-90 (testifying that he knows of no instances in which the impartiality of Texas' Justices of the Peace, who are elected from sub-districts, has been questioned).

515 F.2d 619, 633 (5th Cir. 1975), *vacated on other grounds*, 425 U.S. 947 (1976). *See also* U.S. HLA Brief at 25. These reasons are entitled to no greater weight simply because the elected office at issue is judicial. Indeed because judges are bound by an oath of impartiality no matter how they are elected, the "ward parochialism" concern is even less compelling in the context of judicial elections than it is in the context of legislative contests.

The United States' position is particularly insupportable because the HLA Petitioners did not allege a violation based on at-large elections only. Petitioners specifically challenged the *exclusionary* features of the at-large election scheme. JA. at 16a ("[d]istrict judges in Texas are elected in an exclusionary at-large, numbered place system"). The exclusionary features of the current election scheme, including the numbered post and staggered election requirements, permit the same racially homogeneous 51% of the electorate to choose 100% of the county's judges year

after year.[11] Because voting is highly racially polarized in Harris County, the 18% African American electoral minority can rarely, if ever, elect candidates of its choice, under this system.

The State in this case has not raised any legitimate interest in maintaining the exclusionary features of its at-large election system, nor has the State explained how these features are related to maintaining a "fair and impartial" judiciary. Neither the State nor Judge Higginbotham has explained why HLA Petitioners' proposed alternative at-large election systems, which would lower the threshold of exlusion for minority voters, would not accomodate the State's purported interest in maintaining the countywide electoral feature. Indeed, the State Respondents concede that the HLA, in proposing cumulative and limited voting as alternative electoral systems, have suggested a "creative

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[11]The Respondents' contention that petitioners have advanced a *per se* challenge to the at-large system is completely undercut by the fact that the HLA Petitioners alleged that a non-exclusionary at-large system could cure the dilutive nature of the current system. J.A. at 20a.

[and] useful" solution to curing the proven dilution.[12] Brief of State Respondents at 29.

C. *The State's Nondiscriminatory Reasons for Electing Judicial Candidates At-Large Cannot Cleanse the Proven Vote Dilution in this Case*

To follow the argument advanced by the United States, courts would have to ignore the fact that African American voters cannot effectively participate in district judge elections, simply because the current electoral scheme purports to serve the state's interest.[13] Congress' decision to

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[12]The appropriateness of a remedy is case-specific. Therefore, contrary to the State Respondents' contention, the fact that a lower court refused to uphold the use of limited voting in a particular case is irrelevant to the propriety of that remedy in the case at hand. Brief of State Respondents at 29, *citing McGhee v. Granville County*, 860 F.2d 110 (4th Cir. 1988). In *McGhee*, in fact, the plaintiffs limited their challenge to the "at-large" feature of elections for the County Board of Commissioners. 860 F.2d at 113. Here, HLA petitioners specifically challenged the *exclusionary* features of the at-large system and alleged that alternative at-large remedies could cure the proven violation in Harris County.

[13]Although Texas has expressed an interest in a fair and impartial judiciary, the integrity of a state's judiciary is undermined when one racial group in the community cannot participate in its selection. *See*, Brief of *Chisom* Petitioners at 61. It would seem logical to assume that Texas' purported interest in a fair and impartial judiciary would be served by the inclusion of minority voters in the electoral process.

end voting discrimination "comprehensively and finally," in amending the Act will not tolerate such judicial indifference to minority political and electoral exclusion. S. Rep. at 5.

Moreover, in this case the State's articulated reasons for maintaining countywide judicial elections do not negate the overwhelming evidence that racial vote dilution exists in district judge elections in Texas.

The facts in Harris County, as found by the district court, point indisputably to the existence of vote dilution. In 17 contested district judge general elections in Harris County from 1980-1988, only 2 African Americans won.[14] Pet.

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[14]Respondent-intervenor Wood simply ignores the findings of the district court and reasserts the facts offered by her expert. Many of these facts were rejected by the district court because they were of little probative value. For instance, Judge Wood asserts that the plaintiffs' expert "ignored the three 1978 district judge elections in which blacks ran -- and won -- contested races against a white candidate." Wood Brief at 8. In fact, all three African American candidates ran *uncontested* in the general election that year, although they had opposition in the primary.

Judge Wood correctly states, however, that "[t]wo of those black judges have run -- and won -- every four years since 1978. Only one of those four races was contested; therefore, Petitioners counted only that race." *Id.* Consistent with the racially polarized voting analyses approved by this Court and lower courts, Petitioners indeed focused only on contested races, specifically those in which African American candidates faced white opponents. . *See e.g., Gingles*, 478 U.S. at 52-61. *See also Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989). Judge Wood's conclusions, on the other hand, are based on uncontested elections, elections involving only white candidates, and elections involving Hispanic candidates, although no

App. at 279a. African American and white candidates, even within the same political party, are elected at grossly disparate rates. Thus, 52% of white Democratic judicial candidates were elected between 1980 and 1988, while only 12.5% of African American Democratic candidates were elected.[15] TR. at 3-134-135. This fact, along with the history of discrimination in the County touching upon the

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claims on behalf of Hispanic voters in Harris County were advanced by any of the plaintiffs. Therefore, Respondent-Intervenor Wood's inflated figures which purport to show the success rate for African American candidates in judicial elections in Harris County was not accepted by the district court, and instead the court found the statistical evidence presented by the HLA "legally competent and highly probative." Pet. App. at 296a-297a.

As to the one contested general election referred to by Judge Wood in which the African American candidate won against a white incumbent, the results of that election only further support the plaintiffs' claims. In 1982 Judge Thomas Routt, the African American incumbent, won the general election by a bare majority over a virtual unknown. TR. at 3-162-163; TR. at 3-329. Judge Routt won with only 51.3% of the vote, and testified that keeping voters ignorant of his ethnicity assisted his slim victory. TR. at 3-206-207.

The facts found by the district court are subject to the clearly erroneous standard of Rule 52. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Furthermore, in §2 cases this Court has directed reviewing courts to defer to the local district judges's "particular familiarity with the indigenous political reality" of the State. *Gingles*, 478 U.S. at 79. Should this case be remanded to the Court of Appeals for review of the merits, the panel would be bound by these standards.

[15]Respondent-intervenor Wood dismisses this 40% disparity in candidate success rates between African Americans and whites within the Democratic Party as a natural result of "the vagaries of politics." Wood Brief at 44.

right of African Americans to vote, the depressed socioeconomic condition of the county's African American population, the inability of African American incumbent district judges to be elected, and the existence of extreme racial polarization in voting, support a finding of vote dilution.

D. The District Court Properly Weighed the State's Interests in this Case

The United States erroneously states that the district court "did not consider whether the State has a strong" interest in using at-large elections for judges. U.S. HLA Brief at 24. Contrary to the United States' contention, the State's interests were presented to, and carefully assessed by, the district court. Indeed 3 1/2 pages of the district court's decision are devoted to a factual analysis of the interests asserted by the State, each discussed in turn. Pet. App. at

281a - 284a.[16] The court ultimately found that these interests were "not compelling." *Id.* at 283a. In particular, the district court found that the State's interests could be accomodated using one of several possible remedies.[17] *Id.* at 284a.

E. A §2 Remedy is Directed at Curing Dilution in the Electoral Process, Not Altering the Functions Performed by Judges

Texas' repeated assertion that applying §2 to elected judges will result in federal courts taking over from the

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[16]The district court described the state's asserted interests as: "(1) judges elected from smaller districts would be more susceptible to undue influence by organized crime; (2) changes in the current system would result in costly administrative changes for District Clerk's offices; and (3) the system of specialized courts in some counties would disenfranchise all voters' right to elect judges with jurisdiction over some matters." Pet. App. at 281a - 282a.

[17]Contrary to Respondents' assertions, weighing the state's interests at the remedy phase does not "retreat" from *Gingles*. Brief of State Respondents at 44. The first prong of *Gingles*, in which minority voters show that they are sufficiently numerous and geographically compact to constitute a majority in a single-member district, does not ask plaintiffs to propose a remedy before they prove liability. The first prong of *Gingles*, as discussed *infra* at pp. 31-33, is a demonstration of the causal relationship between the challenged electoral structure and the dilution of minority voting strength.

states the function and administration of the judiciary, fatally mistates the proper scope of the remedy inquiry and the role of the state's interests in the remedial phase of the litigation. *See* Brief of State Defendants at 19-22.

First, §2 protects the rights of *voters*, not litigants. As a result, a §2 remedy is directed at changing the *electoral* process.[18] It does not, as the State Respondents suggest, "intrude into state judicial functions" or purport to change the way judges decide cases. *Id.* at 19-22.

Second, the State underestimates its own role under §2 in remedying the proven vote dilution. At the remedy phase the State, not the federal court, is accorded the first opportunity to propose an election system that affords minorities an equal opportunity to participate in the election of judges. *See McDaniel v. Sanchez*, 452 U.S. 130, 150

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[18]For this reason, the Respondents' argument -- that the relevant standard for measuring minority electoral success in judicial contests is the pool of eligible minority lawyers -- fails. See State Respondents' Brief at 28; Woods Brief at 44-45. The Voting Rights Act does not protect the rights of minority *lawyers* to be elected as judges. It protects the rights of minority *voters* to an equal opportunity to elect the candidates of their choice.

n.30 (1981). So long as the dilution is completely remedied, the State may use its discretion in fashioning a plan to accomodate its *bona fide* interests. Indeed, so long as it cures the proven violation, the federal court must defer to the State's proferred plan. *White v. Weiser*, 412 U.S. 783, 797 (1973). Texas' exaggerated claims of intrusion by the federal court into the State's judicial system are not a necessary result of applying §2 to judicial elections.

In this case, in accordance with established remedial principles, the district court consistently expressed its preference for a State-created remedial plan, J.A. at 159a; Pet. App. at 303a. The court entered an interim order only after the Texas legislature failed to take action during its Special Session to create a remedial plan for district judge elections. J.A. at 159a-161a. The district court subsequently entered an order for an interim remedial plan to be used for the then upcoming 1990 elections *only*. *Id.* at 162a. The sub-district elections required in that plan mirrored the sub-district plan agreed upon by the State

defendants and the plaintiffs in an earlier settlement agreement.[19] *Id.* The proceedings in this case demonstrate that the State, therefore, has the opportunity to act as the principal architect of a remedial plan for the election of judges, should it choose to exercise its power.[20] The State is not, as the Texas Respondents suggest, a powerless entity that sits on the sidelines as the federal court restructures its judicial electoral system, unless it chooses to play such a passive role.

Nor will the application of amended §2 to the state judiciary affect the ability of the states to change to an appointive system for electing judges, as Texas asserts.

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[19]In addition, the district court's plan abolished partisan elections. Plaintiffs never challenged the partisan nature of district judge elections in the challenged counties.

[20]As discussed in our opening brief, the State is free to propose alternative remedies that remove the exclusionary features of the current electoral scheme, such as cumulative or limited voting. The existence of alternative remedies underscores the fallacy of Judge Higginbotham's and the Respondents' premature and incomplete remedy analysis.

Nor is consideration of these alternative remedies precluded because "Congress never debated" their use. Brief of State Respondents at 31. At the remedy phase of §2 litigation "courts should exercise [their] traditional equitable powers to fashion relief so that it completely remedies the prior dilution." S. Rep. at 31. Within these parameters, courts may consider any remedies proposed by the parties.

Brief of State Respondents at 30. As a matter of law, even under the Respondents' reading of the statute, plaintiffs could challenge a State's change from an elective to an appointive system under a §2 intent analysis. House Report at 18. If they were to proceed under a *results* test, however, plaintiffs would be required, as in any §2 claim, to prove that the shift from an elective to an appointive system actually violated §2 of the Act. Even in the absence of §2, however, such a change in Texas would be covered by §5, and would require preclearance from the Justice Department. This court has consistently affirmed §5's application to the election of judges. *Georgia State Board of Elections v. Brooks*, 111 S.Ct. 288 (1990); *Martin v. Haith*, 477 U.S. 901 (1986).

II. The State's Principal Argument Rests on a Fundamentally Erroneous Definition of a Single-Person Officer

In our opening brief, Petitioners demonstrated that §2 unquestionably applies to single person offices. *See* HLA Pettioners' Brief at 35-36. Further, Petitioners showed that even if the single person office analysis may be useful in examining some electoral mechanisms, it clearly is inapplicable to this case, in which 59 judges are elected from one district. *Id.*, at 36-37.

Consistent with §2's focus on the structure of the electoral system, the only court to address squarely the issue of single member offices has held that the term has a clear and unequivocal meaning that has nothing to do with the function of the challenged office. *Southern Christian Leadership Conference v. Siegelman*, 714 F. Supp. 511, 518 n.19 (M.D. Ala. 1989.)[21] Furthermore, even courts faced

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[21]The *Siegelman* court stated that "the *true* hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can therefore be divided no smaller. While mayors and sheriffs do indeed 'hold single-person offices . . . ,' they do so because there is only one such position in the entire geographic area in which they run for election. . . . What is important

with judicial electoral structures in which several judges are elected from the same district, repeatedly have held that these structures are multimember. *See Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) *aff'd* 477 U.S. 901 (1986); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988).

The single person office principle is a descriptive, not an analytic device that has relevance, if at all,[22] when a challenged mechanism has only one office holder in the entire jurisdiction. In fact, the holding of *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986), so heavily relied on by the State is limited, by its express terms, to offices in which there is one officeholder per jurisdiction.

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is how many positions there are in the voting jurisdiction. It is irrelevant, in ascertaining the potential existence of vote-dilution, that these officials happen to exercise the full authority of their offices alone."

[22] *See*, Brief on Petition for Writ of Certiorari of United States as *Amicus Curiae* in *Whitfield v. Clinton*, No. 90-383 (cert. denied) (questioning the viability of *Butts* on the ground that "the [Voting Rights Act] language makes no exception for majority vote requirements, either for single member offices or other types of elected positions.") *See also*, Brief of Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* in *H.L.A. v. Attorney General of Texas*, at 26 and n.22.

Contrary to the State's assertion, nothing in *Butts* authorizes an inquiry into the challenged officeholder's decisionmaking role.[23] The fact that Texas trial judges perform certain functions alone cannot insulate these positions from §2 scrutiny. As *Amicus* the Lawyers' Committee clearly argues in its brief to this Court, Texas' application of a so-called solo decision maker theory to the challenged 59-member body is nothing more than a policy judgment that trial judges should not be elected from subdistricts. Such policy questions are never dispositive of Section 2's applicability and are clearly inappropriate at the liability phase of the proceedings.

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[23]In fact, examination of the functions of the challenged offices in *Butts* reveals that all of the positions involved collegial decisionmakers. *See, e.g., Morris v. Board of Estimate*, 489 U.S. __, 103 L. Ed. 2d. 717 (1989). Moreover, the challenged mechanism in *Butts* was a runoff primary law, not the at-large structure of the district. Thus the entire weight of the State's invented "solo decisionmaker exception" rests on Second Circuit dictum about an issue not before that court.

III. Vote Dilution Can Be Measured in the Absence of the One-Person, One-Vote Requirement

The State of Texas argues that vote dilution cannot be measured under §2 in judicial election cases because the first prong of the tripartite *Gingles* test, requiring minority voters to prove that they are sufficiently numerous and geographically compact to constitute a majority in a single-member district assumes the applicability of the one-person, one-vote rule. Brief of State Respondents at 27. In the absence of the one-person, one vote rule, the State argues, there is no articulable standard for measuring "undiluted" minority voting strength. *Id.* at 27, quoting *Gingles*, 478 U.S. at 88 (J. O'Connor, concurring).

Texas overstates the significance of the illustrative single-member district discussed in *Gingles*. In that case, plaintiffs presented illustrative maps to demonstrate that majority African American single-member districts could be created to give minority voters an opportunity to elect

candidates of their choice to the North Carolina legislature. This Court approved that demonstrative model and noted that "the single-member district is *generally* the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." *Gingles*, 478 U.S. at 50 n. 17 (emphasis added).

In Harris County, an unusually large election district in both physical size and population, plaintiffs quite easily could rely on districts used throughout the state to elect district judges as a "measure" to create illustrative districts in which minority voting strength would not be diluted. In other cases, plaintiffs may use other guides to measure minority voting strength. For example, using sub-districts to illustrate "undiluted minority voting strength," plaintiffs may draw sub-districts based on the average electoral unit used by the state to elect similar officers. For instance, in Texas, district judge districts range from populations of 20,000 to over 2 million. Many judicial districts have

populations under 50,000.[24] *See* U.S. Brief of United States at 26 n.19. Thus, petitioners in this case, demonstrated that African American voters in Harris County could constitute a majority in at least thirteen single-member districts with populations of approximately 40,000 each, a size well within the population variances tolerated by state policy.

Plaintiffs may also demonstrate, by mathematically calculating the electoral threshold of exclusion, that minority voters possess the "potential to elect" candidates of their choice under a limited or cumulative voting scheme.[25] In this case, where Petitioners challenge particular exclusionary features of the at-large system, such a demonstration would also constitute proof of the causal nexus between the current electoral scheme and the impairment of minority voters'

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[24]In fact, 29 state district judges are elected from districts of less than 30,000 persons. Brief *Amicus Curiae* of Mexican-American Legislative Caucus, *et al.*, filed in *LULAC v. Mattox*, Fifth Circuit No. 90-8014, at 12.

[25]*See e.g.*, Karlan, "Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation," 24 Harv. C.R.-C.L.L.Rev. 173, 223-236 (1989); R. Engstrom, D. Taebel & R. Cole, "Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico," The Journal of Law & Politics, Vo. V., No. 3 (Spring 1989). *See* discussion in HLA Petitioners' Brief at 57-60.

ability to elect candidates their of choice.

IV. Congress Has Exercised its Enforcement Power Under the 14th and 15th Amendments to Outlaw Racial Vote Dilution in All Elections

The State of Texas posits as the central question in this case, whether Congress use its enforcement authority under § 5 of the Fourteenth Amendment or § 2 of the Fifteenth Amendment to outlaw unintentional racial vote dilution in elected state judicial systems." State Respondents' Brief at 12. The answer to this basic question is, yes.

According to the State of Texas, Congress could not have exercised its enforcement powers to outlaw racial discrimination in judicial elections unless it clearly and specifically stated that it intended to do so, *id. at 12-17*, and could not have exercised that power over judicial elections in the absence of specific fact-finding regarding racial discrimination in judicial elections. *Id.* at 17-19.

This Court specifically has held that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court upheld Congress' ban on literacy tests "even though there were no findings of nationwide discrimination in voting, let alone findings that literacy tests had been used to discriminate against minorities in every jurisdiction in the country." S. Rep. at 42. Therefore, Congress may use its Fourteenth and Fifteenth Amendment powers to "enact legislation whose reach includes [jurisdictions] without a proven history of discrimination." S.Rep. at 42.

Just as Congress did not need to document the discriminatory use of literacy tests in every jurisdiction in the country to justify the 1970 amendments to the Voting Rights Act, neither is Congress required to document racial discrimination in the election of judges, to make §2 applicable to the elected judiciary. Indeed, unlike the

prohibition upheld in *Oregon*, §2 is not a blanket prohibition against the use of a particular electoral scheme or practice. Minority voters must *prove* the existence of vote dilution in the particular election scheme used by a jurisdiction under §2. Under the totality of the circumstances, judicial election schemes are each reviewed on a case by case basis.

Moreover, facts related to minority state court judges were explicitly included in the data relied upon by Congress in amending §2. *See e.g.* House Report at 7-9; Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) at 38, 193, 239, 280, 503, 574, 804, 937, 1182, 1188, 1515, 1528, 1535, 1745, 1839, 1647; Hearings on S.53, S.1761, S.1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary, 97th Cong., 2d Sess. (1982) at 208-09, 669, 748, 788, 789. Contrary to the State Respondents' claim that there is only a "meager collection of references" to the election of judges, Brief of State Respondents at 25, the legislative history of

the amended Act contains numerous references in the hearings[26] to discrimination in judicial elections and the importance of increased minority participation in the state elected judiciary. These references, exhaustively cited and discussed in the Amicus Brief of the Lawyers' Committee for Civil Rights Under the Law, *et al.*, at 14-19, critically undermine the Respondents' argument.

Most importantly, Congress was satisfied that the need for amended §2 had been "amply demonstrated." House Report at 31. The House and Senate Report, as well as the volumes of testimony in the legislative history attest to Congress' "deliberation" in amending §2 to serve as "the major statutory prohibition of *all* voting rights discrimination." S. Rep. at 30 (emphasis added). This statement of purpose expresses Congress clear intention to cover racial discrimination in all elections, including those for state judges.

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[26]The House and Senate hearings held in 1981 and 1982 represent Congress' fact-finding in amending the Act.

In light of Congress' repeated insistence that amended §2 of the Act, covers *all* elections, *see e.g.* language of §2(a) and §14(c)(1), it is incumbent upon the Respondents to demonstrate Congress' clear intention to *exclude* judicial elections from the Act in 1982. The only offer of proof made by the defendants and the Fifth Circuit in this regard is the use of the word "representatives" in §2(b) of the Act. For the reasons incorporated by reference in our opening brief, the use of the word "representatives" in §2(b) of the Act does not warrant the exclusion of elected judges from the scope of the amended Act. *See Chisom* Brief at 41-42.

Congress' reasons for amending the Act are clear. They are expressly set out at page 2 of the Senate Report in a section appropriately titled "Purpose." None of those reasons relate to the exclusion of elected judges from coverage under §2 of the Act. Congress' only purpose with regard to §2 was "to amend the language . . . in order to clearly establish the standards intended by Congress for proving a violation of that section." S. Rep. at 2. Even the

Fifth Circuit agrees that the Act, prior to amendment in 1982, covered judicial elections, *see* Pet. App. at 26a-28a. Congress' stated purposes in amending the Act does not mention excluding electing judges from §2, therefore, the defendants cannot justifiably argue that Congress either purposefully or inadvertently excluded judges from the scope of amended §2.

CONCLUSION

For the reasons stated above, this Court should reverse the decision below and remand the case for determination of a proper remedy.

Respectfully submitted,

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